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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1157

AIR CARGO, INC., RYDER SYSTEM, INC., RYD-AIR, INC., AIR CANADA, AIRLIFT INTERNATIONAL, INC., ALLEGHENY AIRLINES, INC., AMERICAN AIRLINES, INCORPORATED, BRITISH OVERSEAS AIRWAYS CORP., BRANIFF AIRWAYS INCORPORATED, DELTA AIR LINES, INC., EASTERN AIR LINES, INCORPORATED, MOHAWK AIRLINES, INC., NATIONAL AIRLINES, INC., NORTHWEST AIRLINES, INCORPORATED, NORTHEAST AIRLINES, INCORPORATED, NEW YORK AIRWAYS, INC., FLYING TIGER LINES, INC., OZARK AIR LINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., PIEDMONT AVIATION, INC., SOUTHERN AIRWAYS, INC., SEABOARD WORLD AIRLINES, INC., TRANS WORLD AIRLINES, INC. and UNITED AIR LINES, INC.,

Petitioners,

—against—

BREEN AIR FREIGHT, LTD., and MERCURY AIR FREIGHT, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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March 22, 1973.

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Opinions Below

The opinions of the District Court are not officially reported and are set forth in Appendix A of the Petition. The opinion of the Court of Appeals for the Second Circuit (App. A of Petition) is reported at 470 F. 2d 767.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

Does the Civil Aeronautics Board have primary jurisdiction in this antitrust suit to determine whether the creation and ownership of a ground airfreight carrier which was then given by appellants a complete monopoly of airfreight cartage in the New York City metropolitan area, to the exclusion of all competitors, all without authorization of the CAB, is immunized from operation of the antitrust laws when the antitrust violation complained of constitutes a violation of a CAB Order, a violation of Sections 408 and 412 of the Federal Aviation Act, where the conduct complained of has taken place and is completed, and where the sole remedy sought is damages?

Constitutional, Statutory and Regulatory Provisions Involved

1. United States Constitution, Amendment V, is set forth in Appendix B of the Petition at p. 24a.

2. United States Code, Title 49, Sections 1378(a), 1382 and 1384 (Federal Aviation Act §§ 408(a), 412, 414; 72 Stat. 767, as amended by 74 Stat. 901, 83 Stat. 103) are set forth in Appendix B of the Petition at pp. 24a-27a. In addition, United States Code, Title 49, Section 1301(3) and (10) (Federal Aviation Act § 101(3) and (10), 72 Stat. 737, as amended by 75 Stat. 467, 76 Stat. 143) is set forth in the Appendix hereto, p. 1a.*

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* Respondents' appendix hereto is denominated as "Appendix" without any suffixed letter. The appendix to the petition is denominated "App." with the appropriate suffixed letter.

3. The Economic Regulations of the Civil Aeronautics Board, § 289.3 (14 C.F.R., Part 289), is set forth in Appendix B of the Petition at pp. 27a-29a.

Statement

The Complaint

The first three claims of the complaint (5a-21a)* are based upon practices of the petitioners in the formation and conduct of ACI in the pick-up and delivery of air freight.

In the first claim Breen and Mercury seek money damages under Section 1 of the Sherman Act (15 USC § 1). This claim is based upon the combination and conspiracy of appellants to unreasonably restrain the pick-up and delivery of domestic air freight by unfair business practices. In the second claim, Breen and Mercury seek damages under Section 2 of the Sherman Act (15 U.S.C. § 2) for wilfully monopolizing the defined market area of pick-up and delivery of domestic air freight. The third claim for damages under Section 7 of the Clayton Act (15 USC § 18), is based upon ACI's acquisition of stock in Ryd-Air, Inc., which now monopolizes the ground transportation market of domestic airfreight to the detriment of plaintiffs.

The Proceedings Below

On April 23, 1971 petitioners moved to stay the action on the grounds that their conduct is immune from the operation of the anti-trust laws.

The District Court denied petitioners' motion for a stay, stating:

> "While an express finding of immunity from the anti-trust laws may not be necessary to confer immunity,

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* References are to the Joint Appendix on appeal to the United States Court of Appeals for the Second Circuit. Unless otherwise indicated, emphasis is supplied.

the record does not support blanket approval or continued surveillance of the activities of Air Cargo, Inc., itself acting on its own—to be distinguished from broader, over-all scrutiny of such conceded areas of traditional C.A.B. expertise as tariffs." (App. A, p. 18a).

Petitioners moved for reargument before the District Court, which again denied the stay, saying:

"No party to the ACI-Ryder agreement (not submitted to the C.A.B.) is an 'air carrier' under Section 412(a) of the Act, 49 U.S.C. § 1328(a). Accordingly, the conduct under the ACI-Ryder agreement cannot be immunized and 'arguably lawful' under Section 412 itself and therefore the fact that the agreement has not terminated does not control. *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F.2d 441, 446 (2d Cir.), *cert. denied*, 393 U.S. 846 (1968); See *Trans World Airlines* v. *Hughes*, 332 F.2d 602 (2d Cir. 1964)." (App. A, p. 20a)

On appeal to the Court of Appeals for the Second Circuit, that Court affirmed the orders of the District Court, stating:

"This court cannot agree that the agreements have been immunized, that they are 'arguably lawful,' or that the CAB has jurisdiction, primarily or otherwise, to immunize them. We rest on the ground that the agreements, viewed as interdependent parts of a single inclusive plan, have not been executed by 'air carriers' and that consequently the Board lacks authority to immunize the contracting parties from liability for antitrust damages. Accordingly, nothing would be gained by sending the agreements back to the CAB for preliminary administrative agency action and we decline to do so. See *Silver* v. *New York Stock Exchange*, 373 U.S. 341 at 357-358; *Thill Securities Corp.*

v. *New York Stock Exchange,* 433 F.2d 264 (7 Cir. 1970) *cert. denied,* 401 U.S. 994 (1971) (Chief Judge Swygert concurring at 277)." (App. A, p. 6a).

The Court of Appeals also stated:

> "The agreement forming Ryd-Air has not been submitted to the Board and has not been explicitly approved by it. . . . As we interpret the CAB order, it cannot possibly have comprehended the formation of Ryd-Air or approved its creation years after the issuance of the order. The carefully phrased 'it having been represented' paragraph as well as the 'future development' clause clearly evidence the Board's intention that the future activities of ACI were to be limited under the Order to those explicitly set out in the 1947 agreement." (App. A, pp. 11a-12a; footnote omitted).

Although the Court of Appeals referred to *Trans World Airlines, Inc.* v. *Hughes,* 332 F. 2d 602 (2d Cir. 1964) twice, its holding did not rely on the validity of that case, which has since been reversed by this Court. *Hughes Tool Company* v. *Trans World Airlines, Inc.,* 34 L. Ed. 2d 577 (1973).

The Agreements and Their Consequences

On March 1, 1947 the seventeen certificated domestic air carriers then in existence entered into an agreement among themselves whereby they created Air Cargo, Inc., ("ACI") "to perform, on their behalf and in their names *or as principal,* certain services and to provide certain facilities required in connection with the handling of air cargo" (35a). The purpose in creating ACI was "to promote maximum efficiency and to eliminate unnecessary duplication of expense" with respect to the handling of air cargo (35a).

As required by § 412 of the Civil Aeronautics Act (52 Stat. 1004)* the Agreement (CAB NO. 1041) was submitted to the Civil Aeronautics Board ("Board"), which granted conditional approval by its Order No. E-1086 ("Order") (43a).

From its creation in 1947 until 1970, ACI contracted with various airfreight ground carriers to provide ground transportation for airfreight from airport terminals to and from ground pick-up and delivery locations in the New York City metropolitan area. Among the airfreight ground carriers given pick-up and delivery contracts by ACI were the respondents, Breen and Mercury.

Pursuant to an agreement dated May 30, 1970 between Ryder System, Inc. ("Ryder") and ACI the appellant Ryd-Air, Inc. ("Ryd-Air") was created, owned jointly by Ryder and ACI (101a). Thereafter, by operation of a cartage contract entered into between ACI and Ryd-Air (149a-187a), Ryd-Air was made the exclusive airfreight ground carrier in the New York Metropolitan area.

The 1947 and 1962 Agreements

The agreement dated March 1, 1947, expressly states that seventeen air carriers that were parties to it were creating ACI to perform services "on their behalf and in their names *or as principal.*"

The agreement was approved by the Board on December 31, 1947. The Board's order granting the approval stated:

> "The Board further finding that the future development of Air Cargo, Inc. is *uncertain* and that *its activities may require future reconsideration* of the approval granted herein. . . ." (45a)

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* § 412 of the Civil Aeronautics Act of 1938 (52 Stat. 1004) is continued in effect under § 412 of the Federal Aviation Act of 1958, 49 U.S.C. § 1382 (72 Stat. 770).

Thus, the Board indicated its 1947 approval was not conclusive as to all future transactions entered into by ACI.

The Order also stated:

> ". . . It having been represented to the Board that Air Cargo, Inc. will not have responsibility for nor control over, the rates, charges, rules, regulations, or practices applicable to air transportation; that it *will not issue or sign any shipping contract or document except in the name of and as agent for a member air carrier party to the agreement;* that it will not assume any responsibility to the consignor or consignee of any property transported by air; and it will not hold itself out to the public to perform any service or accept any responsibility except as agent for a member air carrier party to the agreement; . . . (44a)

In the foregoing language the Board indicated that ACI was to act only as an agent, and not as a principal.

The Non-Filing of the ACI Pick-Up and Delivery Agreements

The Board regulation pursuant to which the pick-up and delivery contracts were not filed with the Board is Economic Regulations, Civil Aeronautics Board § 289.3 (App. B., pp. 27a-28a). That regulation stated:

> "§ 289.3. Types of agreements which need not be filed.
>
> • • •
>
> "(c) *Pick-up and delivery.* Agreements between certificated route air carriers or indirect air carriers on the one hand and surface motor carriers on the other hand for pick-up and delivery of property: . . ."

Section 289.3(c) thus requires, as a prerequisite to exemption, that one party to a pick-up and delivery contract be an "air carrier." "Air carrier" is defined in Sec-

tion 101(3) of the Federal Aviation Act of 1958, 49 U.S.C 1301(3), as follows:

> "(3) 'Air carrier' means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided,* That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be in the public interest." (Appendix, p. 1a).

Thus, whether one is an "air carrier" depends on whether one engages in "air transportation." "Air transportation" is defined in Section 101(10) of the Federal Aviation Act as:

> "(10) 'Air transportation' means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft." (Appendix, p. 1a).

The May 30, 1970 agreement pursuant to which Ryder System Inc. ("Ryder"), together with ACI, created Ryd-Air states:

> "WHEREAS, the parties have agreed that a subsidiary of Ryder shall perform air freight pick-up and delivery service in New York City Area A pursuant to a Pick-up and Delivery Service Contract between Air Cargo and such subsidiary, and Ryder has caused the incorporation of Ryd-Air, Inc., a Delaware corporation (hereinafter referred to as 'Ryd-Air'), on May 15 1970, for such purpose, . . ." (101a).

The May 30, 1970 agreement does not state as a function of Ryd-Air that it shall engage in "air transportation" or "the transportation of mail by aircraft." Ryd-Air has never engaged in either of these activities.

The Special Nature of the June 30, 1970 Agreement

The agreement entered into between ACI and Ryd-Air, dated June 30, 1970, is not "substantially identical" with all other pick-up and delivery agreements between ACI and other local motor carriers. It provides that Ryd-Air is guaranteed its operating costs and plus a 5% profit (34a; 153a). The other agreements do not guarantee operating costs and a profit (57a-100a).

ARGUMENT

As the Court of Appeals for the Second Circuit stated in its opinion in this case, the pick-up and delivery or "cartage" agreements that are the subject of this litigation are not "arguably lawful," and therefore, contrary to the contention of the petitioners, that Court's decision is not in conflict with *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966).

The decision of the Court of Appeals is based on the agreements not having been executed by "air carriers" "and that consequently the Board lacks authority to immunize the contracting parties from liability for antitrust damages." 470 F. 2d at 771.

Thus, aside from the issue of whether the Board explicitly or implicitly approved the agreements, the Court of Appeals held that under the definitional sections of the Federal Aviation Act of 1958, Sections 101(3) and (10), 49 U.S.C. § 1301(3) and (10), the Board could not have approved the agreements because its signatories were not "air carriers." Contrary to petitioners' contention, the legality of the agreements is not "debatable," or "arguable," or in any way doubtful; the Court of Appeals' decision is founded on the Board's *lack of jurisdiction* to approve a cartage agreement.

The agreement between ACI and Ryd-Air was not unde the control and surveillance of the Board, as were th transactions in *Pan-American World Airways, Inc.* v *United States,* 371 U.S. 296 (1963) and *Hughes Tool Com pany* v. *Trans-World Airlines, Inc.,* 34 L.Ed. 2d 577 (1973) In both of those cases, there had been explicit approval o the transactions by the Board; there was no question bu that the challenged transactions had earlier received th scrutiny of the Board and after such scrutiny, had bee approved. Nor was there any question, in either case, tha the Board had jurisdiction to approve the transactions.

Because these cartage agreements could not have bee approved by the Board, the case of *Ricci* v. *Chicago Mer cantile Exchange,* 34 L.Ed. 2d 525 (1973), likewise does no apply.

Petitioners are inaccurate when they say that the Boar in 1962 exempted the petitioners from the requirement tha cartage agreements, such as the one here challenged, b filed with the Board. As the Court of Appeals noted below it was impossible for the Board to approve in 1962 a agreement which did not come into effect until 1970.

Nor is it correct that the Board has had surveillance o the activities of ACI for a quarter of a century with respec to its cartage services.

First, since these cartage agreements were not approve by the Board, and could not have been approved by a 196 order, the Board has not had surveillance of these activi ties.

Second, as the Court of Appeals held, the Federal Avia tion Act does not give the Board jurisdiction over agree ments such as this one, and therefore as a matter of law the Board could not have had surveillance over this cartag agreement.

Of course, it need hardly be said that the continuance of illegal activity over a period of years does not convert it to legal activity. Regardless of how long the cartage agreement had been in effect, the mere passage of time would not be relevant.

The validity of any other agreements as a result of the Court of Appeals' decision is pure speculation. It should not be assumed that any other cartage agreement in connection with air freight was entered into under the same state of facts as was the agreement in this litigation and therefore would be affected by the Court of Appeals' decision.

Since the Board is granted jurisdiction only over "air carriers" by the Federal Aviation Act, and a cartage agreement between two entities that are not air carriers is not covered by that Act, this non-coverage is not "emasculation" of that Act. And since the Board never approved the cartage agreement in question, the decision of the Court of Appeals will not put the Board at odds with that Court or, indeed, any court.

I.

No Conflict Exists with *Carnation Co.* v. *Pacific Westbound Conference* and *Ricci* v. *Chicago Mercantile Exchange.*

The holding of the Court of Appeals in this case does not conflict with the holding of this Court in *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213 (1966). That case held that the courts may not impose antitrust sanctions against conduct that is "arguably lawful." The contract in issue here is not "arguably lawful" under the Federal Aviation Act.

Neither Ryd-Air nor ACI come within the Act's definition of "air carrier" and the Board's power to immunize pick-up and delivery, or "cartage," agreements from the

antitrust laws is expressly limited to agreements to which one party is an "air carrier." Therefore, the Board even arguably lacks the power to immunize the contracting parties here from antitrust damages.

In *Carnation,* this Court held that an agreement *prima facie* in violation of the antitrust laws, and that had not been immunized from those laws by the approval of a regulatory agency, could be the basis of a private antitrust suit.

In the present case, while the Board in 1947 approved the creation of ACI, it never approved this cartage agreement, which obviously did not then exist. Furthermore, the guarantee of operating costs and of a 5% profit makes this cartage agreement different than the agreements that were approved.

The Board cannot be said to have approved this agreement implicitly. The Board's 1947 approval of the agreement creating ACI expressly left future agreements for future consideration.

The 1947 approval was also based on ACI's representation that it would not act except "in the name of and as agent for an air carrier." As the Court of Appeals found, ACI entered into the May 30, 1970 agreement with Ryder as a principal. Therefore, the obvious noncompliance with the 1947 representation would strip the 1947 approval of any possible 1970 effect.

In *Ricci* v. *Chicago Mercantile Exchange,* 34 L. Ed. 2d 525 (1973), this Court held that the Court of Appeals for the Seventh Circuit was correct in holding that the Secretary of Agriculture, or the Commodity Exchange Commission, had primary jurisdiction to decide whether a transfer of membership on the Chicago Mercantile Exchange complied with Exchange regulations.

Ricci is not apposite here because respondents do not claim any regulation of the Board was violated. Rather,

in the present case the ACI-Ryder 1970 agreement was never under the jurisdiction of the Board.

The unique expertise of the Board is not required in the present case, as both courts below held. Therefore, the Board's expertise cannot be a factor that argues for giving the Board primary jurisdiction.

There is no good reason why this case should be sent to the Board so it can duplicate the extensive work already done by the courts.

II.

There is no conflict with *Pan American World Airways, Inc.* v. *United States* and *Hughes Tool Company* v. *Trans World Airlines, Inc.*

Petitioners argue that this Court's decision in *Hughes Tool Company* v. *Trans World Airlines, Inc.*, 34 L. Ed. 2d 577 (1973), compels reversal of the Court of Appeals in this case and dismissal of the complaint.

In *Hughes*, the question was whether the Board, which admittedly had the statutory power to review and approve certain aircraft acquisitions by Trans World Airlines, Inc. ("TWA") from the Hughes Tool Company ("Toolco"), and certain financing of TWA by Toolco, had exercised that power. Toolco controlled TWA, and if the Board review and approval had not occurred under § 408 of the Federal Aviation Act, the transactions between TWA and Toolco were not immune from the antitrust laws.

The Board had, from 1944 until 1960, maintained continuous surveillance of the acquisition and leasing of aircraft by TWA from Toolco, and the financing of TWA aircraft by Toolco.

This Court found that:

> ". . . from 1944 to 1960, every acquisition or lease of aircraft by TWA from Toolco and each financing of TWA by Toolco required Board approval. Applications by Toolco were made to the Board in each instance, with the terms and conditions of the transactions being described. Each was approved by the Board and each was regarded as a modification of interpretation of its antecedent control orders under § 408. Each of these transactional orders recited a finding of the Board that the transaction was 'just and reasonable and in the public interest.' " 34 L. Ed. 2d at 587.

Thus, there was no question in *Hughes* that the Board had energetically participated in the process by which TWA obtained aircraft and financing from Toolco. That is not true as to the role of the Board with respect to the cartage and ACI-Ryder agreements of 1970 that are the the basis of this suit.

As this Court stated in *Hughes* at 34 L. Ed. 2d 591, "The point is that the conduct of Toolco with which the Board so extensively dealt in 1950 is the same kind of conduct charged to Toolco in the 1950's and alleged by TWA in its complaint to violate the antitrust laws."

In *Hughes* the Board "specifically authorize[d] as in the public interest specific transactions" (34 L. Ed. 2d at 593-94), and the very transactions that would otherwise have violated the antitrust laws were under the continual immunizing surveillance of the Board. That is not the case here.

Furthermore, each Board approval in *Hughes* was in the form of an order under § 408 of the Federal Aviation Act. It was the continuing and active surveillance by the Board that preempted the antitrust laws from operating with respect to the TWA-Toolco transactions.

In *Hughes* the statutory and regulatory scheme gave the Board power to regulate the transactions in question and

the Board exercised the power. In the present case, because the challenged agreements are not with or between "air carriers" the Board did not have the power to regulate the agreements and never attempted to exercise any such power.

Finally, unlike the Board's tenacious concern in *Hughes*, the Board, in our case, has never evidenced any concern about the agreements under attack.

In *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963), the antitrust charge leveled against Pan American World Airways, Inc. was that it had conspired to keep a subsidiary airline from competing with it. This Court held that the Board had primary jurisdiction because under the plain meaning of § 401 of the Federal Aviation Act both Pan American and the subsidiary were unquestionably "air carriers." This Court also held that the awarding of routes and territories to air carriers and "[w]hether or not transactions of that character met the standards of competition and monopoly provided by [the Federal Aviation] Act is peculiarly a question for the Board, . . ." (371 U.S. at 309).

The regulation of pick-up and delivery agreements is not within the peculiar expertise of an agency charged with regulating aeronautics.

III.

There Has Been No Preemption of the Antitrust Field Under Sections 408 and 412 of the Federal Aviation Act.

Petitioners rely on *Pan American* and *Hughes* to support their proposition that merely because there is an affiliation between Ryd-Air and ACI, the challenged agreements are immunized from the antitrust laws.

As above noted, however, neither of these cases is applicable to the issue in the present case.

The 1947 Order quoted on page 17 of the Petition, which required ACI and its member air carriers to supply the Board with copies of agreements and documents, and submit information to the Board in relation to ACI's activities, was rescinded by the March 8, 1962 regulation of the Board. That regulation dispensed with the requirement that ACI cartage agreements be filed. After the regulation became effective, cartage agreements were not filed and therefore the Board never saw them. It certainly never scrutinized them with the care with which it scrutinized the transactions in *Hughes*.

IV.

The Petitioners Have Not Been Denied Due Process of Law.

The agreements of May 30, 1970 and June 30, 1970 were held to be inseparable by the Court of Appeals. As that Court stated:

> "These agreements, although embodied in separate documents, were clearly of a single inclusive plan wherein Ryd-Air would be formed, and, when formed, would then become the exclusive cartage agent in New York." 470 F. 2d at 770.

The Court of Appeals went on to reason that "any authority the Board might have to immunize the parties from antitrust proceedings must be a broad enough authority to encompass the right to administrative control over the effectuation of both of them." 470 F. 2d at 771.

The Court of Appeals found that this right to administrative control was lacking, and therefore the inseparable agreements could not possibly have been immunized from any antitrust laws by Board action or jurisdiction.

Petitioners seek to phrase this judicial finding of lack of immunization in such a way that it would appear to be

contrary to the Due Process Clause of the Fifth Amendment. They contend that the Due Process Clause entitles them to an evidentiary hearing on this question of law.

The petitioners had two hearings before the District Court on their motion to stay that Court on the ground that the Board had primary jurisdiction. When they made their motion, petitioners were free to present such evidence as they had to the District Court.

The failure of the petitioners to succeed below cannot now be elevated to a due process claim. Petitioners have had their day in court not once, but no less than three times. They were heard on their motion in the District Court and reheard on their motion there. They were heard by the Court of Appeals for the Second Circuit, then submitted a petition for a rehearing *en banc* to that Court.

It should be noted that the petitioners chose not to assert their Fifth Amendment claim when they were before the Court of Appeals.

CONCLUSION

For the reasons stated, the writ should be denied.

Respectfully submitted,

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March 22, 1973.

APPENDIX

Federal Aviation Act of 1958; § 101(3) and (10) [72 Stat. 737, amended by 75 Stat. 467, 76 Stat. 143, 49 U.S.C. 1301(3)]:

(3) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided,* That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be in the public interest.

. . . .

(10) "Air transportation" means interstate, overseas, or foreign air transportation of mail by aircraft.